**MINUTES OF THE**
**BOARD OF ADJUSTMENT MEETING**
**EILEEN DONDERO FOLEY COUNCIL CHAMBERS**
**MUNICIPAL COMPLEX, 1 JUNKINS AVENUE**
**PORTSMOUTH, NEW HAMPSHIRE**

**7:00 P.M.** **October 19, 2021**

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| **MEMBERS PRESENT:** | Vice-Chairman Peter McDonell, Jim Lee, Arthur Parrott**,** David MacDonald**,** Beth Margeson, Alternate Phyllis Eldridge |
| **MEMBERS EXCUSED:** | Chairman David Rheaume, Christopher Mulligan, Alternate Chase Hagaman |
| **ALSO PRESENT:** | Peter Stith, Planning Department |

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Chairman Rheaume was recused from the meeting, and Vice-Chair McDonell assumed his seat as Acting Chair. He noted that Attorney Bernie Pelech, who came before the board to represent clients for many years, passed away. He stated that another member was recused (Mr. Mulligan) and Mr. Hagaman was excused, leaving a total of six voting members for the evening. He said two petitions were withdrawn and there was one request for postponement. **Note**: 276 Melbourne Street was withdrawn before the agenda was set so it is not listed on the agenda.

## I. APPROVAL OF MINUTES

### A) Approval of the minutes of the meetings of September 21 & September 28, 2021.

*Mr. Parrott moved to **approve** the September 21 minutes as amended, and Mr. Lee seconded. The motion **passed** by unanimous vote, 6-0.*

*Ms. Margeson moved to **approve** the September 28 minutes as amended, and Mr. Parrott seconded. The motion **passed** by unanimous vote, 6-0.*

## II. OLD BUSINESS

**A. REQUEST TO POSTPONE** Request of **Ashley Dickenson** and **Elyse Hambacher, (Owners),** for the property located at **125 Elwyn Avenue** whereas relief is needed to demolish existing garage and rear addition on main structure and construct a new garage with dwelling unit above and reconstruct rear addition on main structure including two shed dormers which requires the following: 1) Variances from Section 10.521 to allow a) lot area per dwelling of 2,559 square feet where 7,500 is required; b) a 1' secondary front yard where 15' is required; c) a 5' left side yard where 10' is required; d) a 2' right side yard where 10' is required; and e) 39% building coverage where 25% is the maximum allowed. 2) A Variance from Section 10.513 to allow more than one free-standing dwellings on a lot. 3) A Variance

from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 112 Lot 47 and lies within the General Residence A (GRA) District. (LU-21-172) **REQUEST TO POSTPONE**

**DECISION OF THE BOARD**

Acting Chair McDonell stated that the applicant requested a postponement because he was still reviewing minor changes to the project with his architect.

*Mr. Lee moved to **grant** the request and **postpone** the petition to the November meeting. Ms. Eldridge seconded.*

Mr. Lee said he could sympathize with the applicant and felt that the request to postpone should be granted so the architect could have additional time to complete his work. Ms. Eldridge concurred, noting that the request was made in a timely manner and for a good reason.

*The motion **passed** by unanimous vote, 6-0.*

**B. WITHDRAWN** Request of **Mary H. and Ronald R. Pressman, (Owners),** for property located at **449 Court Street** whereas relief is need to construct a 4th story dormered addition with a height of 41.5' which requires the following: 1) Variance from Section 10.5A43.31 to allow a fourth story addition with at a height of 41.5 feet where 2 stories (short 3rd) and 35 feet is the maximum allowed. 2) A Variance from Section 10.5A41.10A to allow a 6" left side yard where 5 feet is required. 3) A Variance from Section 10.321 to allow a nonconforming building or structure to be extended, reconstructed or enlarged without conforming to the requirements of the Ordinance. Said property is shown on Assessor Map 105 Lot 6 and lies within the Historic District and Character District 4-L1 (CD4- L1). **WITHDRAWN** (LU-21-176)

The petition was withdrawn by the applicant.

**C.** Appeal of **Duncan MacCallum, (Attorney for the Appellants**), of the July 15, 2021 decision of the Planning Board for property located at **53 Green Street** which granted the following: a) a wetlands conditional use permit under Section 10.1017 of the Zoning Ordinance; b) preliminary and final subdivision approval; and c) site plan review approval. Said property is shown on Assessor Map 119 Lot 2 and lies within the Character District 5 (CD5) and Character District 4 (CD4). (LU-21-162)

Acting Chair McDonell read the petition into the record. He reminded the Board that they heard from the parties at the September meeting on whether the appellants had standing and whether the wetlands CUP was within the board's jurisdiction. He said that was resolved and what remained were Counts One and Three. He said Count One's argument was that the Planning Board erred in approving the project without requiring the applicant to obtain a Conditional Use

Permit (CUP) relating to the size of the building footprint, and Count Three was that the Planning Board erred by allowing an extra story than what was allowed under the ordinance.

**SPEAKING ON BEHALF OF THE APPELLANTS**

Attorney Duncan MacCallum was present on behalf of 18 appellants to review the petition. He stated that the Planning Board granted site plan approval on July 15 without issuing a CUP, which allowed the developer to erect a new building with a footprint exceeding 20,000 square feet. He said parts of the new building also fell within the wetland buffer and had three stories, whereas only two stories were allowed within the 100-ft buffer. He said in the CD5 zoning district, Section 10.5A43.43 required that if a building with a footprint greater than 20,000 square feet is erected, a CUP has to be obtained to allow the developer to exceed that limit. He said the plan that the Planning Board approved provided for a new building having a footprint encompassing 29,660 square feet, almost 50 percent over the limit allowed without a CUP. He said the Planning Board erred in getting final site plan approval for the project without issuing a CUP relating to the 20,000-sf limit and by not requiring the developers to apply or meet the criteria for one. He emphasized that it wasn't a case where the Planning Board either granted or denied a CUP improperly, but that they didn't entertain the possibility of issuing a CUP at all. He said the error was so egregious that one of the Planning Board's members, Rich Chellman, wrote a letter to the City Attorney saying that the Planning Board's decision was wrong and asked if there was a way that the Planning Board could reconsider their decision. He said the appellants felt that the reason for the error was that the developers miscited a section of the ordinance in their plans, citing Section 10.5A43.42, which provides that one can build a building having a footprint up to 30,000 square feet as a matter of right if it is a detached liner building, instead of Section 10.5A43.43. He said that, regardless of where the error originated, Section 10.5A43.43 is the section that controls and requires that a CUP be issued if a building is erected other than a detached liner building with a footprint of more than 20,000 square feet. He said the developers claimed that were was never any confusion because they and the Planning Director caught and corrected the error on the record and made clear that Section 10.5A43.43 was the section that applied. He said the developers now claim that Section 10.5A46.21 and .22 related to the overlay district are the ones that control, which is an argument they never made to the Planning Board. He said they were wrong and that it also the opinion of Mr. Chellman. He noted that Mr. Chellman had formidable credentials and had written several zoning ordinances and that he said that Section10.5A43.43 was the one that applied to the project.

Attorney MacCallum said the developers claimed that the sections of the zoning ordinance relating to the overlay district trump all the other sections, but the contrary is the truth. He said they rely heavily on Article 6, Section 10.661 of the overlay district ordinance that says that when there is a conflict between the regulations of an overlay district and those of the underlying district, the overlay district regulations control. He said the problem with that argument is that other articles of the zoning say the same thing and therefore they directly contradict the provision upon which the developers rely on. Attorney MacCallum said Section 10.5A14.10 stated that the provisions of Article 5A shall take precedence over all the provisions of the zoning ordinance that are in conflict with Article 5A, and that Article 10 of the zoning ordinance, the wetlands protection section, says exactly the same thing. He said Section 10.1012.40 of the same ordinance stated the following: 'Not withstanding any other provisions of the zoning ordinance,

the City of Portsmouth and its administrative and operating agencies and instrumentalities shall comply with the provisions of this section.' He concluded that the competing sections of the zoning ordinance all state that in the case of a conflict, they're the ones that control. He cited what Mr. Chellman wrote in his letter to City Attorney Sullivan: 'Whenever there is a conflict among the provisions of the zoning ordinance, the more restrictive provision is the only that will apply and the one that imposes the higher standard upon the developers is the going that will be observed.'

Attorney MacCallum said Section 10.141 set forth a rule of general applicability which permeates the entire zoning ordinance and cuts across all the provisions of the ordinance. He said the other section he quoted did the same thing, therefore all the provisions say that, in the case of a conflict among the provisions of the zoning ordinance, the more restrictive provision will apply. At the very least, he said because the proposed building straddles the zoning district line between the overlay district and the CD5 district and conflicts with the wetland protection ordinance and with Section 10.5A43.43, the developers must comply with the most restrictive provisions of all of those ordinances and it was clear that the applicants are required to obtain a CUP if they want a building to have a square footage of more than 20,000 feet in that district. He said the Planning Board clearly erred and that its decision must be reversed.

Attorney MacCallum said the second ground for appeal had much of the same analysis applied to it -- the issue that pertained to the developers' plan to put two 3-story buildings or two 3-story parts of the building within 100 feet of the water line where only two stories are allowed within the 100-ft buffer. He said the appellants acknowledged the fact that if a developer provides community space as part of his project, he's generally entitled to an extra story – in this case, three stories instead of two -- but that section of the ordinance is trumped by Sections 10.5A21.10 and .20 and by Map 5A21B. He noted that the map's notes indicated the North End Incentive Overlay District between Maplewood Avenue and Russell Street and the boundary of the North End Incentive Overlay District is established at 100 feet by the mean high water line. He said it made it clear that any structure or portion thereof erected within 100 feet of the mean high water line will have no more than two stories.

**SPEAKING ON BEHALF OF THE RESPONDENTS**

Attorney Michael Ramsdell was present on behalf of the respondents. He stated that the development was approved by the Technical Advisory Committee, the Conservation Commission, the Historic District Commission, and the Planning Board. He noted that the Conservation Commission recommended the plan by a unanimous vote because it was a good development with substantial public benefits for Portsmouth, benefits that included removing an existing building that presents a public safety concern due to the protrusion of the building, creating a public sidewalk, adding a stormwater management system, providing more than 22,000 square feet of community spaces that included 15,000 square feet of greenway space, and providing a sewer easement to the City along the railroad tracks. He said the improvements also included a paved access driveway, pedestrian access, utilities, landscaping, and a pedestrian and bicycling trail. He said that, because the development is in the North End Incentive Overlay District, it's in keeping with the character of the neighborhood and complies with the City's zoning ordinance. He noted that the appellants' arguments had all been waived and none of them

were made before the Planning Board, so they couldn't be raised in front of the BOA for the first time. He said there were no merits to their arguments because the building height and footprint were based on the application of the wrong zoning ordinance provisions. He said the appellants were wrong in saying that a CUP was needed to erect a building larger than 20,000 square feet and that the development wasn't entitled to a third story. He said the appellants' underlying premise that a more restricting zoning provision trumps the zoning provision for the North End Incentive Overlay District was also wrong.

Attorney Ramsdell gave the Board members a handout to explain how they cited the law in their appeal and Memorandum of Law. He said their position on what zoning ordinance provisions control was correct began with Section 10.611, the rules for the overlay district, that stated that overlay districts apply special rules to manage land use in specific areas that may be portions of a single zoning district or may overlap two or more districts, and unless specifically provided otherwise in the regulations for an overlay district, all regulations of the underlying zoning district shall apply. He concluded that the overlay district regulations control and that the rules for the overlay districts trump the rules for an underlying zoning district in the event of a conflict. He said the provision in Section 10.5A that was argued -- that the provisions of Article 5A shall take precedent over all other provisions of the zoning ordinance that are in conflict with Article 5A -- didn't present a real conflict because the provisions relied on all came from Article 5A. He said Section 10.5A44 stated that in the incentive overlay districts, certain specified development standards may be modified as set forth in 10.5A46.10 if the developer provides community space, and that a development is any man-made alteration of land, a lot, or a building or other structure. He said that Section 10.5A46.10 provides that the building footprint may be increased from 20,000 square feet to 30,000 and that the building height may be increased by one story. Section 10.5A46.20 provides the requirements to receive the incentives to the development standards and that there was no dispute that his client had met and exceeded those requirements.

He said Sections 10.5A46.21 and .22 state the requirements and there was a big difference between .21 and .22. He said .21 stated the requirements for a lot adjacent to or within 100 feet of North Mill Pond, whereas .22 stated the requirements for a lot that is more than 100 feet from North Mill Pond, and that the critical point was the recognition that the development standards apply to lots located adjacent to or within 100 feet of North Mill Pond. He said that recognition meant that it couldn't be reasonably argued that the development standards of the North End Overlay District required to be met to achieve the incentives of Section 46.10 do not extend to lots adjacent or within 100 feet of North Mill Pond. He said the language provided that as long as the development within the overlay district involved a lot that extended adjacent to or within 100 feet of North Mill Pond, the development is eligible for the building height and footprint incentives set forth in Section 10.5A46.10, and to find otherwise would be to find that Sections 10.5A46.21 and .22 are meaningless.

He said it also couldn't be argued that the zoning map itself controls because the zoning map first became part of the zoning ordinance in April 2014 and was amended in August 2015 and in July 2016, and none of the amendments since that time had impacted the North End Overlay District at all. He said the amendments to Sections .21 and .22 became part of the zoning ordinance in August 2018. He read a section of the published zoning amendments document, the 8-20-18 zoning amendment, as follows: 'Amend Section 10.5A46.20 requirements to receive

incentives to the development standards to clarify Section 10.5A46.21 public greenway requirements for lots within 100 feet of the North Mill Pond.' He said the intent of the zoning ordinance was to provide public access to the pond via the greenway open space and to have buildings step down towards the water, which were goals that the development achieved. He said it was a basic rule of statutory construction that when an ordinance is passed later in time, the governing body that passes it is presumed to know everything that's in there at that time, so the fact that the zoning amendment that specifically provides for incentives if building within 100 feet of North Mill Pond comes after the zoning map means that the zoning map is not a bar to continue extending a lot that exists both inside or outside 100 feet from the North Mill Pond.

Attorney Ramsdell said Portsmouth was a crown jewel of New Hampshire and to keep it that way, the zoning ordinance had been amended many times and that it wasn't difficult to find conflicting zoning provisions. He said he provided the board with the best and correct interpretation of the zoning ordinance, but he said it wasn't all that the development accomplished. He said the appellants' interpretation of the zoning ordinance would retard the goals of the City's 2015 Vision Plan for the north end and hurt the City's ability to create wonderful civic spaces like the waterfront trail along the pond. He said the zoning interpretation that the developers had advanced, which was agreed to by the City Staff and Planning Board, would produce public benefits and would align with the vision plan. He noted that the developer had 12 public meetings, six noticed meetings, and five public hearings, and that the Planning Board did the right thing by approving the project and that the Board should affirm that decision by denying the appellants' appeal.

**QUESTIONS FROM THE BOARD**

Acting Chair McDonell said he understood what Attorney Ramsdell was saying but that he struggled with Sections 10.5A46.21 and .22. He said the appellants stated that even if the BOA said it would apply the Incentive Overlay District's requirements to the portion of the property that's within the Incentive Overlay District, the 100-ft buffer between the pond and the district would have different requirements. He said the appellants' argument was that the requirements of the underlying zone, not the overlay district, applied, but the developer disagreed and said Sections 10.5A46.21 and .22 had to be looked at, and those make a distinction between lots that are within 100 feet of North Mill Pond or other water bodies and lots that aren't. He said that all made sense. He said, however, that the developer was saying that the lot at issue was located adjacent to or within 100 feet of North Mill Pond, and that fell within Section 46.21. He said the developer was given the community space, so they get to have a slightly higher building. He said the impetus for requiring community space for property close to the water was to let the public walk around, and for property further away, workhouse housing could be provided. However, he asked how the developer responded to the argument that the development at issue has to be within the Incentive Overlay District, notwithstanding that they bifurcated what they were allowed to do between .21 and .22, and he still thought all the development had to be within the part that's more than 100 feet away from the water body.

Attorney Ramsdell said the zoning map indicated that the end of the overlay district was 100 feet from the North Mill Pond, and that was where you'd have to stop. He said .21 and .22 divide different criteria for a lot within 100 feet of the pond and outside 100 feet. If the district stops at

100 feet, then this provision for a lot adjacent to or within 100 feet is now read out of the zoning ordinance. He said it has no meaning or effect because you've drawn a line in the sand, you've read out of existence Sections 10.5A46.1 and .22 because they came after the zoning map. He said they have to have meaning and have to have been presumed that the ordinance writers understood exactly what they were doing.

Acting Chair McDonell agreed that it would be nonsensical to interpret the ordinance as how to read out .21 and .22, but that one could probably read .21 and .22 as not to say that the lot happens to be within 100 feet of North Mill Pond and part of it is located within the Incentive Overlay District. He said one could do anything on that lot rather than being able to do anything within the portion of the lot located within the overlay district. He said one didn't have to read out .21 and .22 from the ordinance to say that you still have to construct your development on the portion of the lot that's within the overlay district. Attorney Ramsdell said it plainly did not say that, pointing out that Section 10.5A46 related to specified development standards that had a clause about the development providing the community space or workforce housing. He said if that was applied to Acting Chair McDonell's question, the concept and the definition of the word 'development' would be taken away and replaced by a word like 'lot' or 'building' controlling it instead. He said lots and buildings were parts of development, not the other way around. He noted that people working on a zoning ordinance try to think of everything it may impact, but no one catches all of them, so that was where there were rules of statutory construction. He said the idea of whether the board would be allowing a lot or building to subsume the definition of development was incorrect because the ordinance defined development as including lots and buildings, which was why the developers' reading of the ordinance was right and why the City Staff agreed with it. Acting Chair McDonell concluded that when the developers talked about the development, the fact that they could provide some community space on the other side of the dividing line between the overlay district and the 100-ft buffer meant that the development was everything they did to develop that parcel. Attorney Ramsdell agreed.

Ms. Margeson asked Attorney MacCallum to address the argument that a CUP wasn't required if community space was provided because it was the Incentive Overlay District. Attorney MacCallum said a CUP was needed if one built in excess of 20,000 square feet because the building wasn't just going to be confined to the overlay district --- parts of it would invade the 100-ft wetlands buffer, which is in a different zoning ordinance, and he referred to the map to prove his point. He said the developer had to comply with both districts' rules, and the rules for the wetlands buffer were very strict. In the case of a conflict, Article 5A said it will control, Article 6 of the overlay district says it will control, and the wetlands protection ordinance says it will control. Therefore, the thing to do was to adopt the most restrictive requirements. He said the developers had to comply with all requirements but that they did not comply with Article 10 nor Article 5A and that they had to get a CUP for a building exceeding 20,000 square feet. Ms. Margeson asked whether, when dealing with two character districts, the one with the most permissive regulations applied. Attorney MacCallum said it was the opposite – the more restrictive provision applies in case of a conflict.

Ms. Eldridge noted that Attorney Ramsdell said that Section 10.5A46.21 was applicable to the project and allowed the developer to go into that buffer zone, and if it didn't, she asked what it meant and when would it be applicable. Attorney MacCallum said Section 10.5A46.21 stated

that the regulation plan is the zoning map for the character and civic districts. He said the regulation plan consists of Maps 10.5A21, character districts and civic districts, and 10.5A21B has building heights standards. He said it certainly did apply and that the map was incorporated into Section 10.5A21.20 by reference. Referring to the argument that the later-enacted amendment supersedes the earlier maps, he said all they have to do is amend the ordinance so that it makes it clear, but the way the ordinance read now was that Map 10.5A.21B was part of the zoning ordinance and applies.

Mr. Parrott said the ordinance states that the purpose of the buffer zones is to protect the waterway, and he asked what the waterway is protected from. Attorney MacCallum said it was to protect the ecosystem, vegetation, animal life, and the quality of life for people who live around North Mill Pond, and that was why it was so important that new buildings stay out of the wetlands buffer.

Attorney Ramsdell said what was meant by protecting the buffer zone and the water was that, in order to develop property along the waterfront, one had to meet certain standards. He said there was currently an old building existing in the footprint, so it wasn't like the proposed building would be placed in greenspace. He said the buffer zone would be improved, as well as the water, and habitat. He said the ordinance rules said there could be development in there but that you had to leave it better than you found it, so the buffer zone did not prohibit development.

Mr. Parrott said there would be more human activity close to the ponds, including walkways, bikeways and so on, as well as things people could do to property. He asked why that was an improvement. He said he had trouble making the connection between the purposes of protecting the waterway and encouraging more activity closer to it. Project engineer Patrick Crimmins said the developers would place an advanced treatment system to improve the stormwater discharged into the pond, they would plant native plantings, trees, and grasses within the buffer, they would put in a porous asphalt path to provide stormwater treatment along the paved way by the waterway, and they would provide recreation for the water body.

Acting Chair McDonell opened the public hearing.

**SPEAKING IN FAVOR OF THE APPELLANTS' APPEAL**

Liza Hewitt of 139 McDonough Street said the developers presented a plan for a 29,000-sf footprint that was approved by the Planning Board in contradiction to the ordinance, and if the developer had designed the building using the 20,000-sf footprint instead, there would have been plenty of room on the property to avoid building in the 100-ft wetlands buffer.

Abigail Gindele of 229 Clinton Street said the new construction would change the character of the whole area. She said the greenway was a glorified sidewalk and that the area wasn't busy enough for car traffic, so the existing sidewalks could be used. She said putting people in the 100-ft buffer zone would destroy the pond's ecosystem.

John Howard of 179 Burkett Street said the Planning Board made several mistakes, resulting in the approval of a development that should have been denied. He said Mr. Chellman in his letter

to the City Attorney discussed what mistakes were made, but that the Planning Board chose to ignore this evidence and should have reconvened to have a discussion of whether a development of that size was appropriate for the site.

**SPEAKING IN OPPOSITION TO THE APPELLANTS' APPEAL**

Barbara DeStefano of 9 Brewery Lane urged the board to dismiss the appellants' appeal of the Planning Board's decision. She said she didn't understand how the appellants had standing because they weren't abutters. She said she attended the 2015 North End Charrettes, where the decisions were in favor of larger, taller, and different-looking buildings and ended up with the new overlay district. She said the greenway was part of the City's plan to connect Bartlett Street to Maplewood Avenue and around the north end for bikes and pedestrians and that the developer would clean up all the junk that was thrown into North Mill Pond. She said another apartment building was needed in Portsmouth instead of more condominiums.

Jeff Johnston of 299 Vaughan Street said he was part of the project team and also an abutter. He passed out copies of the North End Vision Plan to the board. He said the greenway was an important part of why the incentives were put in place, and that a central feature of civic space was the waterway network along the pond's periphery. He said when they built the AC hotel, it was important for the City to get a deeded right for the one acre provided behind the 3S Arts building when the project only needed to give a 14,000-sf easement. He said that showed how important the greenway was for the City and the rules that the developer applied when they went through the zoning process for the project. He said the City did the right thing in making the fourth or fifth floor the incentive if they were given the greenway. He said the building the developer permitted stepped down towards the water and was in context with the Sheraton and AC hotels. He asked that the appeal be denied.

**SPEAKING TO, FOR, OR AGAINST THE APPELLANT'S APPEAL**

Attorney MacCallum said Mr. Ramsdell talked about all the improvements the developers would make, but the fact was that there was a strong policy in favor of wetlands protection and it didn't matter how many improvements were implemented because the developer would still have to comply with the rules. He said a CUP was needed if a building exceeding 20,000 square feet was built, and if it was built within the wetlands buffer, it should be no more than two stories. He also pointed out that the construction activity would harm the wetland buffer by disrupting the ecosystem and animal life, causing pollution, and causing harm to the North Mill Pond in general. He said the buffer zone didn't prohibit development but there were strict regulations that had to be complied with that were spelled out in the six criteria.

No one else rose to speak, and Acting Chair McDonell closed the public hearing.

**DISCUSSION OF THE BOARD**

Mr. MacDonald said it was a good government problem and that good government wasn't good here because the City had an ordinance that said you can't do something like put a big factory in the North Mill Pond side, but as time progresses and social and financial consequences of that

decision become apparent, people start thinking of ways to take the sting out of that, which can get something passed and is like a Band-Aid®, but then the Band-Aid turns wonderful things into bad things, and there's a Band-Aid applied to that. He said it was the same as spot zoning, which never worked. He said it was a monumental job to reshape legislative processes and all the existing laws because of the way it all originated, and he thought most of the revisions to ordinances were reactions to economic conditions and to the kinds of things that couldn't actually be solved. He asked how you solve a problem that big, saying that it hurts almost every part of the City and other cities and towns, and it's enabled by local government at the city and town level and State government by the way legislature requests are processed. He said he didn't have a solution but that there needed to be some effort focused on fixing the spot zoning ordinance problem.

Ms. Margeson said she wasn't sure that the vision for the north end that was developed in 2015 has been realized the way people think or had hoped for. She said the comment that the City Staff and Planning Board were in favor of the project was also concerning. She thought the line between the regulated and the regulators had been blurred on the project considerably, which was very concerning, and that it was very apparent at the last hearing. She thought the applicable zoning ordinance for analyzing the project was Section 10.5A46.10 because it was an incentive overlay issue and controlled everything that happened in the project. She said for Counts One and Three, the size of the building and the extra story were explicitly allowed in Section 10.5A.46.10, so she would not support the appeal.

Mr. Lee said the North End Preliminary Vision Plan had a rendering of a bunch of buildings along the North Mill Pond, but what he didn't see in any of the buildings were 5-story buildings. He said most of the buildings were 2- or 3-story ones that directly abutted the pond, which told him that the vision, preliminary or not, was not for 5-story buildings along the pond. He said there were some 5-story buildings back from the pond, however. Ms. Eldridge said that, as much as the Board may have difficulty accepting the size of the building, it seemed that the project was what the City was looking for. She said the City had wanted greenways for 20 years. She said the incentive program may give too much away for too little, but it stands and it's legitimate and it has influenced the development. She said she was not in favor of the appeal.

Acting Chair McDonell said the Board was tasked with enforcing the ordinance, not writing into it what they thought it should be. He referred to the first question about which part of the ordinance controls. He said the Board heard from the appellants that Section 10.141 talked about how the more restrictive provisions of the ordinance would govern, and Section 10.511 talked about when you have two requirements for the same dimensions, the more restrictive requirement governs. He said, therefore, there's an argument on that side that says the more restrictive provision controls, and the argument on the other side says it doesn't because Section 10.611 specifically says that when you have an overlay district, all the regulations of the underlying zoning district apply. However, when there's a conflict between those, the overlay district regulations control. Then you say, okay, there appears to be a conflict between the provisions in the ordinance, so how do we resolve it so that we don't have to throw something out entirely. He said it was just a basic principle of statutory construction that you try to read a statute or an ordinance as a whole and try not to throw things out if you can read it coherently without doing that. He said he didn't think one could read this coherently without doing that, and

in order to do that, one had to say that the thing that did apply was the only way you could read these provisions as not conflicting with each other and say yes, ordinarily the most restrictive provision will govern, but in the case of an overlay district, when there is a conflict, regardless of what the conflict is, the overlay district regulations control. He said he didn't think that conflicted with any of the other provisions that had been cited, so he felt that the requirements that Ms. Margeson cited in Section 10.5A46.10 control.

He rhetorically asked whether Section 10.5A46.21 meant that you could develop any part of a lot that's located within 100 feet of the North Mill Pond, or if it meant that you can only develop the part of the lot that's shown on the map as being within the overlay district. He said he agreed with the respondents' attorney and referred to Section 46.21 that said the development had to provide community space and a multi-use path that's parallel or located within 50 feet of the waterfront. He said it clearly states that you have to do something as part of the development as a whole within that 100-ft buffer that, according to the map, is not part of the overlay district. He said that he didn't think there was any issue in reading Section 10.5A46.21 to say that the overlay district controls for this lot, period, and wasn't just part of the lot that's not within100 feet, so when all that was taken together, it was plain from the language of the ordinance that it's Section 10.5A46 that governs both the building coverage question and the number of stories allowed. He said he would also vote not to grant the appellants' request for those reasons.

*Ms. Margeson moved to **deny** the appellants' appeal, and Ms. Eldridge seconded.*

Ms. Margeson said she was moving to deny on the grounds that the controlling ordinance is Section 10.5A46.10 and therefore in Count One, it allows for a building up to 30,000 square feet and also for an extra story and that there was no requirement for a CUP.

Ms. Eldridge concurred and had nothing to add.

*The motion **failed** by a tie vote of 3-3, with Mr. Lee, Mr. MacDonald, and Mr. Parrott voting in opposition.*

City Attorney Bob Sullivan was present and said the failed motion presented the situation that the Board had thus far taken no action and that the Acting Chair should weigh another motion.

*Mr. Lee moved to **grant** the appellants appeal, and Mr. MacDonald seconded.*

Mr. Lee said he read all the 10.0 sections of the ordinance and thought that one reason the Board was called the Board of Adjustment was because they had the latitude to make decisions that aren't in black and white. He said the best interest of the City of Portsmouth needs to be served. He said the BOA was looking at the City, and more important, the City of Portsmouth was looking at the BOA. For those reasons, he said the Board should grant the appeal.

Mr. MacDonald concurred and said he was happy to second it.

*The motion **failed** by a tie vote of 3-3, with Ms. Eldridge, Ms. Margeson, and Acting Chair McDonell voting in opposition.*

The Board and City Attorney Sullivan discussed whether the case should be postponed to the following week's meeting or whether the excused board member should review the meeting recording and vote, which might present fairness issues because he couldn't ask questions. City Attorney Sullivan said if the Board took no action, the Planning Board decision would not be overturned and the appeal would not succeed. He said the Acting Chair's position by analogy of comparing the case to an appeal for an administrative official, which had been used before in related matters, would be a fair approach. Acting Chair McDonell said he was inclined to consider that the failure to have an affirmative vote to grant the appeal constituted a lack of reversal of the Planning Board's decision, and that he would think of it as if the Board were asked to reverse the decision of a code official. Ms. Margeson said there was no other way to read the Board's actions to be fair and that when a board vote was tied, the result was denial. Therefore, the appellants' appeal was denied.

## III. OTHER BUSINESS

There was no other business.

## IV. ADJOURNMENT

The meeting was adjourned at 9:09 p.m.

Respectfully submitted,

Joann Breault
BOA Recording Secretary